Asia Pacific Guide to Lending and Taking Security - Indonesia

When lending to borrowers

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# 1. Are there any restrictions in relation to the type of borrower who may borrow foreign currency or in relation to the term of foreign currency and/or the amount of foreign currency borrowed by local entities?

To the best of our knowledge, Indonesian borrowers are not restricted from borrowing in foreign currency. However, there are restrictions on the use of foreign currency in Indonesia (international financing transactions are exempted) and on the type of borrower that may borrow from foreign lenders.

Approval from the Minister of Finance

The ministries, regional governments and regional-government-owned entities are prohibited from receiving offshore loans.

Generally, Indonesian state-owned entities may only receive offshore loans if the offshore loan does not require a guarantee or collateral from the government of Indonesia, including Bank Indonesia or other state-owned banks, for the repayment, and if it will not give rise to any obligation from the government of Indonesia because of the acceptance of the offshore loan. However, there could be exceptions as may be determined by the government of Indonesia.

Indonesian state-owned entities and regional-government-owned entities are prohibited from providing security or acting as guarantors for the repayment of offshore loans received by state-owned entities, regional-government-owned entities or private companies.

The Minister of Finance must approve the offshore loan granted to a state-owned entity after hearing opinions from the Minister of the National Planning Agency, the Governor of Bank Indonesia and the Director General of Budget Financing and Risk Management.

Specific approval for certain industries

Specific approval is required for certain industries. In the banking industry, for example, a bank intending to obtain a long-term offshore loan (i.e., a loan having a tenor of more than one year) is required to obtain approval from Bank Indonesia. The application for approval must be submitted at least one month prior to receiving the offshore loan. Mining companies must also obtain approvals from the Minister of Energy and Mineral Resources before obtaining loans.

Local entities

There are no restrictions in relation to the term or the period and/or amount of foreign currency loans borrowed by local entities in Indonesia.

# 2. Are there any restrictions on the rate of interest or default interest that may be charged?

There are no restrictions on the rate of interest or default interest that may be charged. However, in two cases over approximately the past 20 years, the court decided to modify the agreed interest rate. The court did not provide any specific reasoning but in both cases, the court mentioned that the interest rate needed to be modified to be in accordance with the average interest rate applicable to state-owned banks and, in the earlier case, the court made several references to "justice".

As Indonesia is a civil law jurisdiction, court decisions do not create precedent in Indonesia. Court decisions are only final and binding on the parties to the case.

For Indonesian tax purposes, if the lender and borrower are related parties, the interest rate used must be the market rate.

# 3. Are there any restrictions on particular lenders or classes of lender entering into credit transactions with borrowers?

No, there are no such restrictions.

# 4. Are there any exchange controls that will apply to payments to be made in foreign currencies or to foreign lenders?

The purchase and sale of foreign currency between banks and their customers is subject to the following requirements:

The exchange of rupiah into foreign currency without an underlying transaction is limited to USD 100,000 or its equivalent for a cash transaction per month per customer in the foreign exchange market.

A customer's purchase of foreign currency without an underlying transaction is limited to USD 100,000 or its equivalent for a derivative exchange rate forward transaction per month in the foreign exchange market.

A customer's sale of foreign currency without an underlying transaction is limited to USD 5 million or its equivalent for a derivative exchange rate forward transaction per transaction in the foreign exchange market.

A customer's purchase of foreign currency without an underlying transaction is limited to USD 100,000 or its equivalent for a non-forward derivative exchange rate transaction per month in the foreign exchange market.

A customer's sale of foreign currency without an underlying transaction is limited to USD 1 million or its equivalent for a non-forward derivative exchange rate transaction per transaction in the foreign exchange market.

Any purchase or sale of foreign currency above these limits must be supported by an underlying transaction. The maximum amount of foreign currency that can be purchased is equal to the value of the underlying transaction.

Rupiah transactions

Bank Indonesia has issued regulations on transactions in the foreign exchange market, as well as a policy on the use of rupiah in international activities ("**BI Forex Regulations**"). The BI Forex Regulations stipulate certain restrictions in respect of transfer overseas of rupiah, which include that onshore banks are prohibited from transferring rupiah overseas. However, Bank Indonesia provides an exemption to carry rupiah, and use rupiah offshore for the purpose of international activities that will be further stipulated in an implementing regulation to be issued by Bank Indonesia.

Onshore banks may transfer rupiah to an onshore account of a non-resident or to an onshore account jointly owned by a resident and a non-resident, provided the following conditions are met:

The nominal value does not exceed the equivalent of USD 1 million per transaction, or such transfer is made between rupiah accounts owned by the same non-resident.

If the value exceeds USD 1 million per transaction, the recipient bank of such transfer must ensure that the non-resident has an Underlying Transaction.

An "Underlying Transaction" is defined as an activity underlying the purchase or sale of foreign currency against rupiah, which includes the following:

Activities in the current account, such as export, import and income transfer (primary and secondary).

Activities in the financial account, such as foreign direct investment and portfolio investment.

Activities in the capital account, such as capital transfer.

Loans or financing from onshore banks to a resident for the purpose of investment and trade.

Trading of domestic goods and services.

Other underlying transactions stipulated by Bank Indonesia.

# 5. Is there any requirement to deduct or withhold tax from any amounts to be paid or repaid to a lender (whether domestic or foreign)? If so, at what rate must tax be deducted and from what kinds of payment?

The borrower is required by the laws of the Republic of Indonesia to withhold tax at a rate of 15% if the lender is an Indonesian tax resident and is not a bank in Indonesia; or 20% or the reduced withholding tax rate under the relevant tax treaty if the lender is a non-Indonesian tax resident from any payment of interest and any other payment of a similar nature in relation to loan documents.

# 6. Are there any “thin capitalization” or other rules that may limit the extent to which interest payments may be deducted for tax purposes?

The Minister of Finance issued Regulation Number 169/PMK.010/2015 on the Determination of the Debt-to-Equity Ratio (DER) for Companies to Calculate Income Tax ("**Regulation 169**"). Regulation 169 stipulates that the maximum permissible DER for income tax purposes is 4 to 1.

Regulation 169 is only applicable to corporate taxpayers whose capital consists of shares. Generally, however, there are six types of corporate taxpayers whose capital consists of shares that are not subject to this regulation, i.e., corporate taxpayers engaging in the following:

The banking sector

The financial institutions sector

The insurance and reinsurance sector

The oil and gas sector, which is based on production-sharing contracts, contracts of work or other mining cooperative agreements that do not set out a DER requirement

Business activities where the income is subject to final income tax

The infrastructure sector

If corporate taxpayers that are not exempted from Regulation 169 cannot meet the requirements under Regulation 169, their deductible borrowing costs will be limited to an amount that is in line with the 4 to 1 DER.

Regulation 169 also requires taxpayers that have foreign loans from private parties to report the amount of the loan to the Director General of Tax. If the taxpayers do not report the loan, the borrowing costs related to the loan cannot be deducted for tax purposes. The procedure to report the loan will be regulated further in a regulation that will be issued by the Director General of Tax.

# 7. Are there any registration, notarization, translation or reporting requirements in relation to the loan documents?

Registration and notarization

There are no registration or notarization requirements in respect of the loan documents, except as follows:

Fiducia security must be made in notarial deed form and in the Indonesian language, and it must be registered with the relevant fiducia registration office through the fiducia registration online system (which can only be accessed by a notary).

A hak tanggungan (a security right over a land right) must be made in a Pejabat Pembuat Akta Tanah (PPAT) (land deed official) deed form and in the Indonesian language, and it must be registered with the relevant land office. The registration of a hak tanggungan can be done through an online system.

A hypothec over a vessel must be made in a grosse deed form and in the Indonesian language, and it must be registered with the relevant ship registration and recording official (Pejabat Pendaftar dan Pencatat Balik Nama Kapal).

A security over warehouse receipts must be made in an agreement and should be registered with the Warehouse Registration and Management Center (Pusat Registrasi dan Pengelola Gudang). The registration is submitted to the Monitoring Body (Badan Pengawas) in a form that is determined by the Monitoring Body.

Further information about fiducia security, hak tanggungan, hypothec and security over warehouse receipts is set out in the answer to question 10 of the "If taking security" section.

Translation

On 9 July 2009, the government of Indonesia enacted Law No. 24 of 2009 on National Flag, Language, Emblem and National Anthem dated 9 July 2009 ("**Law 24**"). Law 24 requires implementing regulations to be issued within two years after 9 July 2009. On 1 March 2010, the president of Indonesia issued Presidential Regulation No. 16 of 2010 on the Use of  Indonesian Language in Official Presidential and/or Vice Presidential as well as other State Officer Speeches ("**PR 16**"). On 30 September 2019, the president of Indonesia issued Presidential Regulation No. 63 of 2019 on the Use of Indonesian Language ("**PR 63**"), which was only made public on 9 October 2019. PR 63 basically revokes PR 16 and further stipulates the use of Indonesian language.

Article 31.1 of Law 24 and Article 26.1 of PR 63 require the use of Indonesian language in memoranda of understanding and agreements involving state institutions (lembaga negara), Indonesian government authorities (instansi pemerintah Republik Indonesia), Indonesian private institutions (lembaga swasta Indonesia) or Indonesian individuals (perseorangan warga negara Indonesia). The elucidation of Article 31 of Law 24 states that an agreement in this context includes international agreements made within the framework of public international law.

The applicability of Law 24 and PR 63 would affect the execution of the loan documents by Indonesian individuals or Indonesian private institutions with offshore parties. Article 31.1 of Law 24 and its elucidation and Article 26.1 of PR 63 are not particularly clear on whether: (a) the term "Indonesian private institutions" includes Indonesian companies or Indonesian branches of foreign companies; and (b) the term "agreements" includes private commercial agreements.

Article 31.2 of Law 24 and Article 26.2 of PR 63 further state that if the memoranda of understanding or agreements involve foreign parties, the national language of those foreign parties and/or the English language can also be used. Please note that the elucidation of Article 31.2 states that if an agreement is executed in multiple languages, (i.e., Indonesian language, the national language of the foreign party and/or English), each version will be equally authentic. Law 24 and PR 63 seem to also imply that the use of other language(s) in an agreement can only be done in agreements involving foreign parties, although Law 24 and PR 63 do not explain the form of the involvement being referred to.

Article 26.3 of PR 63 stipulates that the national language of those foreign parties and/or the English language are or is used as an equivalent or translation of the Indonesian language version to reconcile the understanding of the agreement with the foreign parties. This seems to imply that the Indonesian language version would need to exist first before the national language of those foreign parties and/or the English language versions exist because the non-Indonesian language version is a mere "equivalent" or "translation," and therefore the logical consequence would be that at the very least both versions or a bilingual form will need to be signed at the same time.

Article 26.4 of PR 63 further stipulates that if there is the national language of the foreign parties and/or the English language version, parties to an agreement may contractually choose the governing language of the agreement, which shall prevail upon any inconsistencies between the language versions. Law 24 and PR 63 do not provide for any sanction for failure to comply with the above requirements.

Reporting obligations

A company (as defined in the Bank Indonesia foreign exchange activities reporting regulations) intending to obtain offshore loans is required to submit reports to Bank Indonesia in relation to its offshore loan plan by 15 March of the relevant year.

In addition, a company (including state-owned entities) that has offshore loans in place must submit monthly reports to Bank Indonesia and the Ministry of Finance of the Republic of Indonesia on or before the 15th of the following month. The reports must provide details of the facility agreement and its implementation including the receipt of any disbursements, making interest payments and repaying principal. Subsequent periodic reports must be made in accordance with the prevailing laws and regulations.

Further, any company that has an offshore loan in place must implement prudential principles and submit its implementation reports and financial information to Bank Indonesia.

In addition to the above requirements, certain types of offshore loans must be withdrawn from a bank that is licensed by Bank Indonesia to trade foreign currency ("**Bank Devisa**"). These offshore loans are those arising from one of the following:

Non-revolving loan agreements.

Debt securities in the form of bonds, medium-term notes, floating rate notes, promissory notes and commercial paper.

Any discrepancy between the amount of a new offshore loan being used to refinance an existing offshore loan and the amount of the existing offshore loan that is being refinanced.

The monthly report to Bank Indonesia for this type of loan must be accompanied by a supporting document evidencing that the company has withdrawn the offshore loan from a Bank Devisa.

# 8. Are there any stamp, documentary, registration, notarization or other taxes, duties or fees chargeable in relation to the loan documents? If yes, what are the amounts and when are they payable?

Other than the registration fees for the registration of the security as set out in the answer to question 7, no registration tax, documentary tax or other similar taxes are payable under the laws of the Republic of Indonesia in relation to loan and security documents. However, as of 1 January 2021, stamp duty at the rate prescribed under Law of the Republic of Indonesia No. 10 of 2020 on Stamp Duty, i.e., IDR 10,000 is payable on each of the loan and security documents. The stamp duty becomes payable when a document is executed when a document is made, when a document is handed over to the party for whom the document is made, when a document is presented before an Indonesian court, or when a document will be used in Indonesia (if it has been executed outside of the Republic of Indonesia).

In addition to the IDR 10,000 stamp duty, a non-tax state revenue (Penerimaan Negara Bukan Pajak (PNBP)) is payable in relation to certain security documents. The amount of the relevant PNBP is set out in the answer to question 11 of the "If taking security" section.

# 9. Does the law recognize the subordination of the debt that a debtor owes to one creditor to that which the debtor owes to another creditor? If yes, how is this usually effected?

Indonesian law recognizes the concept of debt subordination. The subordination is effected in a subordination agreement between the debtor, subordinated/junior creditor and the senior creditor. Under the subordination agreement, claims of the subordinated/junior creditor are subordinated to the claims of the senior lender until the debt owed by the debtor to the senior creditor is paid in full.

# 10. Are there any classes of unsecured and unsubordinated creditor whose claims against a debtor would rank equally with or above those of the debtor’s other unsecured and unsubordinated creditors (e.g., the claims of employees and tax authorities or the claims of creditors under particular kinds of instrument)? If yes, what classes of creditors are preferred?

Claims are paid in the following descending order of priority:

Court costs of foreclosure in relation to movable and immovable goods, paid from the proceeds of the foreclosure

Tax liens

Secured creditors (e.g., pledgees, hak tanggungan holders and fiducia security grantees)

Unsecured creditors holding limited privileged claims in relation to specific assets under Article 1139 of the Indonesian Civil Code (ICC)

Unsecured creditors holding general privileged claims in relation to all assets generally under Article 1149 of the ICC

All remaining claims, i.e., unsecured or concurrent claims

**Limited privileged claims**

The limited privileged claims under Article 1139 of the ICC are as follows:

Court costs and fees (incurred by the court to conduct an auction over the movable or immovable goods of a debtor)

Claims relating to the leasing of immovable property, including repair costs which are borne by the lessee and all claims relating to any leasing agreement

Any unpaid purchase price in relation to movable property

Any costs incurred to preserve goods

Repairman’s costs

Any unpaid claims of a hotel owner against its guests

Transportation costs and other additional costs

Reimbursement of payments made by public officers

**General privileged claims**

The general privileged claims under Article 1149 of ICC are as follows:

Court costs (for auction and settlement of inheritance)

Funeral costs

Costs for medical treatment

Laborers’ wage claims

Claims in relation to the supply of food for the preceding six months

Claims for boarding school fees for the previous year of study

Claims from underage persons and persons under guardianship in relation to their guardians

# 11. Are there any consumer protection or similar laws that apply if credit is made available to individuals or other classes of debtor? If yes, what laws are applicable?

There is a consumer protection regulation in relation to the financial services sector administered by the Financial Service Authority (Otoritas Iasa Keuangan (OJK)). The regulation applies to financial services business providers and consumers. The protection provided under the regulation is in relation to the giving of information by the financial services business provider to its consumers. The obligations imposed on the financial services business provider include giving clear and accurate information about products and services and providing the information in either Indonesian language or with a translation of the non-Indonesian language into Indonesian language.

# 12. Are there any prohibitions or limitations on the extent to which a company can give financial assistance for the purchase of: (a) its own shares or those of any affiliated company; or (b) assets owned by it or any affiliated company?

There is no prohibition under Law no 40 of  2007 on Limited Liability Company (Company Law)  in relation to a company giving financial assistance for the purchase of its own shares or those of any affiliated company or assets owned by it or any affiliated company. However, there are some limitations in relation to the purchase by a company of its own shares.

Under the Company Law, the company may repurchase issued shares under the following circumstances:

The repurchase of those shares does not cause the net assets of the company to become less than the subscribed capital plus the mandatory reserves that have been set aside.

The total nominal value of the shares repurchased by the company and the pledge of shares or the fiducia security over shares held by the company and/or other companies whose shares are directly or indirectly owned by the company do not exceed 10% of the amount of subscribed capital in the company unless otherwise provided in capital market regulations.

The Company Law further stipulates that the shares repurchased by the company may only be held by the company for a maximum of three years.

The purchase of shares in a company (Company A) by a company (Company B) that is owned directly or indirectly by Company A is prohibited by the Company Law because the purchase will cause a cross-shareholding issue between Company A and Company B.

Furthermore, under the Company Law, there is no prohibition or limitation in relation to a company purchasing assets owned by an affiliated company.

Nevertheless, for transactions involving a listed company or its controlled company (defined in OJK Rule No. 42/POJK.04/2020 on Affiliated Party Transactions and Conflict of Interest Transactions ("**OJK Rule 42**")), capital market regulations in relation to affiliated party transactions and conflict of interest transactions might apply depending on the nature of the transaction, the relationship between the parties, and the value of the transaction. A transaction by a publicly listed company or its controlled company having a certain value that falls under the materiality threshold set out in the prevailing regulation (i.e., OJK Rule No. 17/POJK.04/2020 on Material Transactions and Change of Business Activity) will also be subject to certain procedures.

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